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Supreme Court of the United States

October Term, 1948.

No. 9.

CHARLES KOVACS,

Appellant,

v.

ALBERT COOPER, JR., JUDGE OF THE FIRST DISTRICT POLICE COURT OF TRENTON.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLANT.

GEORGE PELLETTIERI,
Counsel for Appellant.

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BRIEF FOR APPELLANT.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code or 28 U. S. C. 344 (a).

Under the Act of Congress of January 31, 1928, Chapter 440, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on Writ of Error. This case presents a state of facts within the jurisdiction of this Court.

OPINIONS OF COURTS BELOW.

The judgment of the New Jersey Supreme Court was affirmed by the New Jersey Court of Errors and Appeals by an equally divided Court which rendered any opinion by the Court impossible. The statement of the New Jersey Court of Errors and Appeals to that effect is reported in 135 N. J. L. 584, 52 Atl. 2d 806 and is set out in the record. [24] [1] Reported in the same place are the opinion written by Mr. Justice Howard Eastwood of the New Jersey Court of Errors and Appeals in which Mr. Justice Harry Heher and Judge Wells and Freund concurred, and the opinion of Mr. Justice Colie. These opinions favored the reversal of the judgment of the New Jersey Supreme Court. They are set out in the record. [18-24] The opinion of the New Jersey Supreme Court is reported in 135 N. J. L. 64, 50 Atl. 2d 451 and is set out in the record. [10-15] The First District Police Court of the City of Trenton did not write an opinion.

STATEMENT OF CASE.

Questions Presented.

1. Do the provisions of the Ordinance, which forbid the use of sound devices upon the streets or thoroughfares of the City of Trenton, prohibit and abridge appellant's exercise of freedoms of speech, press, assembly, and the freedom to communicate information and opinions to others contrary to Section 1 of the 14th Amendment to the United States Constitution?

2. Is it within the police power of the City of Trenton to prohibit completely the use by speakers on its public streets and thoroughfares of sound amplifying devices that are not inherently dangerous to the safety, health, morals,

1. All figures appearing in brackets herein denote pages of the printed record.

peace, general welfare or property of the city's inhabitants?

3. Is the Ordinance, on its face and as construed and applied, unconstitutional because it abridges appellant's freedoms of speech, assembly, press and to communicate information and opinions to others contrary to the 14th Amendment to the United States Constitution?

4. Are the provisions of the Ordinance so obscure, vague and indefinite as to make them impossible of reasonable interpretation contrary to the 14th Amendment to the Constitution of the United States?

5. Are the provisions of the Ordinance, which fail to fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises and what is unnecessary and unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, basis or limitations to act as a guide in forming a judgment, in violation of the 14th Amendment to the United States Constitution?

Legislation Drawn in Question.

This case draws into question the validity of State legislation, to wit, Ordinance No. 430 of the City of Trenton, New Jersey, passed August 8, 1946, and the 4th Section of said Ordinance, reading as follows:

> "1. That it is hereby declared to be a nuisance and it shall be unlawful for any person, firm or corporation to make, cause or suffer or permit to be made or caused upon any premises owned, occupied or controlled by him or it, or upon any public street, alley or thoroughfare in the City of Trenton, any unneces-

sary noises or sounds by means of the human voice, or by any other means or methods which are physically annoying to persons, or which are so harsh, or so prolonged or unnatural, or unusual in their use, time and place as to occasion physical discomfort, or which are injurious to the lives, health, peace and comfort of the inhabitants of said city, or any number thereof.

"2. That it shall be unlawful for any person, firm or corporation to play, use, operate or permit to be played, used or operated any radio receiving set, musical instrument, phonograph or other machine or device for the production or reproduction of sound with louder volume than is necessary for convenient hearing of the person so playing, using or operating such instrument or device and such persons who are voluntarily listeners thereto, or in such manner as to disturb the peace, quiet and comfort of neighboring inhabitants. Nothing herein contained shall be construed to prohibit playing by a band or orchestra in a hall, building or in the open air.

"3. That it shall be unlawful for any person, firm or corporation for advertising purposes or for the purpose of attracting the attention of the passing public, to play, use, operate, or permit to be played, used or operated any radio receiving set, musical instrument, phonograph, loud speaker, sound amplifier, or other machine or device for the producing or reproducing of sound on the streets or public places of the City of Trenton or in any place where the sound therefrom is cast directly upon the streets or public places, or which is so placed and operated that the sound therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public place, or of persons in neighboring premises.

"4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee,

to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned.

"5. That it shall be unlawful for any person, firm or corporation to sound any horn or warning device on any automobile, motorcycle, bus or other vehicle, except when required by law, or when necessary to give timely warning of the approach of the vehicle or as a warning of impending danger to persons driving other vehicles or to persons upon the street. No person shall sound any horn or warning device on any automobile, motorcycle, bus or other vehicle which shall emit an unreasonably loud or harsh sound, or for any unnecessary or unreasonable period of time.

"6. That any person, firm or corporation who shall violate any of the provisions of this ordinance shall upon conviction thereof be punished by a fine of not to exceed two hundred ($200.00) dollars, or by imprisonment in the county jail for a period of not to exceed ninety (90) days, or by both such fine and imprisonment, and each violation of any of the provisions of this ordinance, and each day the same is violated shall be deemed and taken to be a separate and distinct offense.

"7. That all ordinances and parts of ordinances in conflict or inconsistent with this ordinance are hereby repealed, but only to the extent of such conflict or inconsistency, and this ordinance shall be in full force

and effect immediately upon its adoption and its publication, as provided by law.

"8. Should any section, paragraph, sentence, clause, or phrase of this ordinance be declared unconstitutional or invalid for any reason, the remainder of said ordinance shall not be affected thereby." [5-7, 26-28]

Timeliness.

The decision of the New Jersey Court of Errors and Appeals was rendered on the 24th day of April, 1947. [24] On the 9th day of December, 1947, the Judgment of Affirmance on said decision, which is here sought to be reviewed, was entered whereupon the judgment of conviction became final. [25] The Petition for Appeal to this Court was duly and timely presented. [25-30] The application for the allowance of the appeal was presented on June 20, 1947. [30] On December 11, 1947, after the Judgment of Affirmance, which is the final judgment of the New Jersey Court of Errors and Appeals, was entered, an order was made and entered allowing appeal to this Court. [30-31] On June 21, 1948, this Court noted probable jurisdiction. [35]

Form and History of Action.

This proceeding was instituted in the First District Police Court of Trenton, New Jersey, by a complaint. The complaint charged that appellant, Charles Kovacs, on August 22, 1946, violated the 4th Section of the above-named Ordinance of the City of Trenton, No. 430, entitled "An Ordinance to Prohibit the Making of Unnecessary Noise" in that he "did, on South Stockton Street, in said City, play, use, and operate a device known as a sound truck." [3]

Appellant was arrested on August 23, 1946, under such complaint. The case came on for hearing in the First District Police Court of Trenton on the same day. [4] At the opening of the case appellant, through its counsel, de-

murred and moved to dismiss the complaint on the ground that the Ordinance upon which it was based was unconstitutional, giving his grounds and reasons therefor, which motion was denied. [4] Appellant thereupon entered a plea of not guilty and was brought to trial. [4] Evidence was presented on behalf of the State and by appellant. [4] He was adjudged guilty, convicted and sentenced to pay a fine of $50.00. [5]

On application of the appellant, the Supreme Court of New Jersey on September 9, 1946, issued a Writ of Certiorari directed to Albert Cooper, Jr., Judge of the First District Police Court of Trenton, to review the legality of said judgment of conviction. [1] Reasons for setting aside the conviction and sentence were duly served and filed. [7-9] After argument, submission and deliberation the New Jersey Supreme Court affirmed on January 13, 1947. [15-16]

On January 14, 1947, appellant duly served and filed his Notice of Appeal and Grounds to the New Jersey Court of Errors and Appeals. [16] After argument, submission and deliberation the New Jersey Court of Errors and Appeals, on April 24, 1947, filed a statement that the Judges being equally divided on the question whether the judgment should be reversed, the judgment is affirmed solely because of such division. [24] On June 20, 1947, appellant duly presented his Petition for Appeal, Statement, Assignments of Error and Prayer for Reversal to the court below. [30-31] On December 9, 1947, a Judgment of Affirmance of the New Jersey Court of Errors and Appeals was duly entered whereupon the said judgment of the New Jersey Court of Errors and Appeals became final. [25] The Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals allowed appeal to this Court on December 11, 1947. [30-31] This Court noted probable jurisdiction on June 21, 1948. [35]

Facts.

Appellant is a life long resident of the City of Trenton. At the time of his apprehension and arrest on August 23, 1946, he was engaged in operating and using a sound apparatus attached to a motor vehicle on South Stockton Street, in Trenton, New Jersey, for the purpose of expressing himself on the subject of a labor dispute which was in progress on said South Stockton Street in said city. [3-5]

How Issues Raised.

In the First District Police Court of Trenton, the appellant demurred and filed a Motion to Dismiss the Complaint raising, among other things, the constitutional questions herein listed. [4] The Judge of the Police Court specifically passed upon the constitutional questions raised by the appellant. The motion was denied. [4]

In his Reasons for Reversal filed on the certiorari to the New Jersey Supreme Court, the appellant attacked the provisions of the Ordinance on the grounds that they deprived him of his rights of freedom of speech, of press, of assembly and to communicate information and opinions to others. He further attacked the Ordinance as being violative of the 14th Amendment of the Constitution of the United States because it is so obscure, vague and indefinite as to make it impossible of reasonable interpretation and because it does not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises, and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, basis or limitations to act as a guide in forming a judgment. [7-9] These were overruled by the New Jersey Supreme Court. [10-15] The

New Jersey Supreme Court affirmed the judgment of conviction by the Police Court of the City of Trenton. [15-16]

The same constitutional questions were raised before the New Jersey Court of Errors and Appeals. (Brief of appellant in New Jersey Court of Errors and Appeals pages 4, 5.)

The New Jersey Court of Errors and Appeals affirmed the judgment. [25].

The New Jersey Court of Errors and Appeals certified that the constitutional questions were duly raised and considered and overruled. [30]

The Petition to this Court, duly filed in the New Jersey Court of Errors and Appeals, attacked the constitutionality of the Ordinance involved for each and every one of the Reasons advanced in the Courts below and as hereinbefore set out. [25-30]

In his Statement of Points Relied Upon, appearing in the record in this case, the appellant alleged that the Ordinance is unconstitutional because it abridges his rights of freedom of speech, freedom of press, freedom of assembly and freedom to communicate information and opinions to others, because its provisions are so obscure, vague and indefinite as to make them impossible of reasonable interpretation and because the provisions of the Ordinance do not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises, and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, basis or limitations to act as a guide in forming a judgment all contrary to the 14th Amendment to the Constitution. [32-33]

SUMMARY OF ARGUMENT.

The Provisions of the Ordinance Deprive Appellant of His Rights to Freedom of Speech, Freedom of Press, Freedom to Communicate Information and Opinions to Others and Freedom of Assembly Contrary to Section 1 of the 14th Amendment to the United States Constitution.

A.

Public streets and thoroughfares are natural and proper places for assembly and communication of ideas through speech. In fact this is the only way of reaching millions of persons who are not accessible by house-to-house visitation.

B.

The right to speak carries the right to be heard. The right to be heard implies the rights to use auxiliary devices to reach the hearers in the exercise of speech at assemblies and in public places.

C.

Sound amplifying devices are a necessary adjunct to modern-day effective public speaking at assemblies.

D.

Freedom to be heard is as vital to freedom of speech as is freedom to circulate to freedom of press.

E.

Restricting the abridgment to the use of sound devices may not be justified on the ground that the right of free speech without such auxiliary remains unimpaired.

F.

The specious argument leading to a factitious conclusion that the use of sound devices resulted in forced audience abuse of free speech should be rejected.

G.

The provisions of the Ordinance do not regulate as to time, place and manner the use of sound devices ancillary to free speech and are, therefore, not within the police power of the City of Trenton and are prohibitory and are not regulatory.

H.

There is no showing that the use of sound device in this case was an abuse of the right of free speech so as to present a clear and present danger to interests that the City of Trenton had the right to protect.

I.

The Ordinance is presumptively unconstitutional because the State has failed to discharge the burden of proof imposed upon it in civil cases in prosecutions where the First Amendment is involved.

J.

The police power of the State authorizing the prohibition and censorship of commercial pursuits and activities does not enter here.

K.

The Ordinance is void because, on its face and as construed and applied, it prohibits the exercise of freedoms of speech, press, assembly and to communicate information and opinions to others.

L.

The Ordinance is void because its provisions are so obscure, vague and indefinite as to make them impossible of reasonable interpretation.

M.

The Ordinance is void because its provisions do not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises, and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, bases or limitations to act as a guide in forming a judgment.

N.

The decisions sustaining anti-noise ordinance, as applied to sound devices used in connection with public speech at assemblies and upon public streets, are not sound.

ARGUMENT.

The Provisions of the Ordinance Deprive Appellant of His Rights to Freedom of Speech, Freedom of Press, Freedom to Communicate Information and Opinions to Others and Freedom of Assembly contrary to Section 1 of the 14th Amendment to the United States Constitution.

A.

Public streets and thoroughfares are natural and proper places for assembly and communication of ideas through speech. In fact this is the only way of reaching millions of persons who are not accessible by house-to-house visitation.

Public streets, parks, highways, hustings, commons, plazas and other public places have been used as forums for the dissemination of information and opinion, public discussion and the exchange of ideas upon social, political, economic, religious and other important subjects in which the people have an interest as far back as the mind of free people can remember. These forums cannot be denied to the people by censorship laws or prohibitory laws. *Jamison v. Texas*, 318 U. S. 413, 63 S. Ct. 669; *Schneider v. New Jersey*, 308 U. S. 147; *Hague v. C. I. O.*, 307 U. S. 496.

There is a very practical reason why persons use such public places for these purposes. Today millions of people do not remain at home during such hours as are ordinarily devoted to house-to-house calls. The only possible way to reach those millions of people, under favorable weather conditions, is by going publicly upon the streets and into the parks and other public places.

B.

The right to speak carries the right to be heard. The right to be heard implies the right to use auxiliary devices to reach the hearers in the exercise of speech at assemblies and in public places.

If one has the right to use of the streets, to assemble in public meeting, to speak to those assembled, and to communicate information and opinion, then certainly one has the right to speak in such a manner as to be heard whether it be on the city streets or anywhere else. Just as the right of free press includes the right to "distribute," so freedom of speech includes the right to be "heard." Any statute or Ordinance which seeks to prevent the use of a sound apparatus, in effect, prohibits one from being heard, and, for all practical purposes, enforces a ban on the rights of assemblage and freedom of speech and freedom to communicate information and opinion to others.

C.

Sound amplifying devices are a necessary adjunct to modern-day effective public speaking at assemblies.

This case falls squarely within the rule announced in *Saia v. New York*, 334 U. S. 558, where the Court declared:

> "Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached."

Therefore, the right to interfere with the use of such amplifying devices is limited to the same rules of restraint and regulation as would apply to any restraint upon the exercise of freedom of speech itself. The mere fact that this is an amplifying device does not alone provide the city with new and extraordinary reasons for prohibiting and censoring the use of such device.

D.

Freedom to be heard is as vital to freedom of speech as is freedom to circulate to freedom of press.

In the case of *Ex parte Jackson*, 96 U. S. 727, the Court said: "Liberty of circulating is as essential to that freedom (freedom of the press) as liberty of publishing, indeed, without the circulation, the publication would be of little value."

The same principle applies to the case at bar. A speech is delivered to an audience. The freedom to make a speech includes the freedom to attract a crowd and to be heard. Section 4 of the Ordinance cannot be saved because it relates to the distribution of speech and not to the enunciation, for liberty of circulating is as essential to that freedom as liberty of speaking. Without the circulation, the enunciation would be of little value. *Ex parte Jackson, supra; Lovell v. City of Griffin*, 303 U. S. 444; *Saia v. New York, supra.*

E.

Restricting the abridgment to the use of sound devices may not be justified on the ground that the right of free speech without such auxiliary remains unimpaired.

The Supreme Court of New Jersey conceded that the freedoms of expression and assembly of appellant may have been prohibited, but justifies such prohibition on the ground that it leaves untouched his right to express his views orally without the aid of an amplifier. It is well established by a long line of decisions that the restriction of any basic civil right cannot be justified by the fact that other rights remain unimpaired and that the denial of a right in one manner, respect or place may not be warranted by the freedom to exercise that right in other ways, respects or places. See *Schneider v. State of New Jersey*, 308 U. S. 147, where the Court declared: "But as we have said, * * * one is not to have the exercise of his liberty of expression in appro-

priate places abridged on the plea that it may be exercised in some other place."

F.

The specious argument leading to a factitious conclusion that the use of sound devices resulted in forced audience abuse of free speech should be rejected.

The Court below adopted a "forced audience" theory to support its decision. The Court here should not adopt such a theory to support the decision below.

Certainly, there cannot be said to be more of an element of compulsion in the use of a sound amplifier in the exercise of freedom of expression and freedom of assembly, than exists when literature is distributed in the exercise of freedom of the press and speech, whether by handing it to a person, leaving it on his doorstep, or sending it through the mails. Nor is there any greater compulsion than can be said to exist in canvassing, soliciting or making house-to-house calls for religious or political purposes. *Schneider v. State of New Jersey, supra; Lovell v. Griffin, supra; Cantwell v. Conn., supra; Ex parte Jackson, supra.* Those are just as much acts of compulsion in the same sense as the use of a sound amplifier.

However, the "forced audience" theory in such circumstances has been entirely vitiated by the decisions of the Court in the above cases and definitely in the use of *Martin v. City of Struthers, Ohio*, 319 U. S. 141. There, appellant, espousing a religious cause, canvassed homes of strangers, knocking on doors and ringing doorbells in order to distribute to the inmates of the homes leaflets advertising a religious meeting. The city ordinance forbade the summoning of inmates in that manner for that purpose. The Court held the ordinance to be a violation of the constitutional rights to free speech and press. Mr. Justice Black, speaking for the Court, stated (319 U. S., p. 141):

> "For centuries it has been a common practice in this and other countries for persons not specifically in-

vited to go from home to home and knock on doors or ring doorbells to communicate ideas to occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the federal Constitution's guarantee of free speech and press, possesses this power . . . [¶] . . . This freedom embraces the right to distribute literature, *Lovell v. Griffin*, 303 U. S. 444, 452, and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets. *Schneider v. State*, 308 U. S. 147, 162. . . . [¶] . . . Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." 319 U. S. at pp. 141-142, 143, 146-147.

The City of Trenton does not have the power to determine for all its inhabitants that they do not desire to listen to expressions of opinions enunciated over sound amplifiers. It must preserve for those who desire to exercise their freedoms of expression and assembly in that manner and for those who are willing listeners their rights so to do, just as it must preserve the right of a distributor of literature and of those willing to receive it. The first duty of the City is to preserve those constitutional privileges. Whatever inconvenience it causes the City, the City must find ways to regulate without invading constitutional rights.

Our Courts have gone far to protect the right of free speech together with the other basic civil rights from invasion in any degree even to the extent of leaving them to the caprice of a licensing officer or an electorate. In the case of *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, the Court pointed out that one's right to life, liberty and property, to free speech, free press, freedom of worship and assembly and other fundamental rights may not even be submitted to a vote and they depend on the outcome of no election. The Court carefully considered the Law of the State of West Virginia compelling the flag salute by school children and further pointed out that those freedoms are susceptible of restriction only to present grave and immediate danger in which the State may lawfully act and that it is the purpose of the 14th Amendment to the Federal Constitution to reserve those rights from all official control.

The Court, in *Saia v. New York*, *supra*, pointed that:

> ". . . . We must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the Cantwell case, freedom of the press in the Griffin case and freedom of speech and assembly in the Hague case. . . . [¶] Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position."

G.

The provisions of the Ordinance do not regulate as to time, place and manner the use of sound devices ancillary to free speech and are, therefore, not within the police power of the City of Trenton and are prohibitory and are not regulatory.

The only permissible limitation upon the exercise of the freedoms of speech, press, assembly and of communicating information and opinions to others, may be said to be, at most, reasonable regulation as to time, place and manner. The power of municipalities to enact regulations in the interests of public safety, health or welfare or convenience may not be so employed as to abridge those constitutional rights. Civil liberties are not subjected to the "comfort and convenience" of the citizens. *Cantwell v. Connecticut, supra; Schneider v. Town of Irvington, supra.*

Ordinances prohibiting or censoring the exercise of these activities have uniformly been held unconstitutional. "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, a fortiori, invalid." *Jones v. Opelika,* 316 U. S. 584, 595, 596.

The Ordinance in question cuts off entirely from the hearer the right to hear effectively a public speech in a public place. It deprives the speaker of the right to be heard intelligibly by his entire audience. It therefore abridges the right of freedom of speech and of communication and of assembly. It certainly is not regulatory as to time, place or manner in which one may use a sound amplifying device in the City. It does not purport to be a revenue-raising measure to bear any excessive police burdens resulting from the use of sound equipment.

It must be conceded that the public utterances of appellant amplified in the interest of willing listeners come clearly within the category of free speech and assembly guaranteed by the Federal and State Constitutions.

The Ordinance is not regulatory. It appears on its face to be prohibitory.

The section of the Ordinance in question is not limited to speech which is obscene, offensive to public morals or advocates unlawful conduct. Nor does it make comfort or convenience in the use of streets the standard of official action. It is comprehensive in its ban of the use of sound apparatus and forbids it for any and every purpose. There is no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants or the misuse or obstruction of the streets. It prohibits entirely the use of a device which is a great convenience to those who desire to hear and be heard and has a necessary relationship to the exercise of freedom of speech and assembly.

Although the rights previously enumerated are not absolute, and the State in the exercise of its police power may punish the abuse of these freedoms, it cannot under the guise of regulation abridge or infringe upon them.

The permissible limitation or regulation rather than prohibition or censorship is stated by the Court as follows (*Saia v. New York, supra*):

> "Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. But to allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. The police need not be given the power to deny a man the use of his radio in order to protect a neighbor against sleepless nights. The same is true here.
>
> "Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discre-

tion, it sanctions a device for suppression of free communication of ideas."

Although this case falls squarely within the principles laid down by the Court in *Saia v. New York, supra,* the Ordinance in question goes much further than the Ordinance of the City of Lockport which the Court declared invalid. While the City of Lockport attempted to make a pretense at regulation by means of the issuance of a permit, the Ordinance in the instant case does not even go through the motions of regulation but lays down an absolute ban on the use of sound amplifying devices everywhere in the City of Trenton and at all times.

H.

There is no showing that the use of sound device in this case was an abuse of the right of free speech so as to present a clear and present danger to interests that the City of Trenton had the right to protect.

The Supreme Court of New Jersey contended that the use of a sound truck constitutes a potential nuisance and as such is within the police power of the City for the reasons that [12]:

> "The attention of motorists is diverted from the efficient operation of their vehicles while that of pedestrians is involuntarily attracted to the source of the noise. Thus new traffic hazards are added to ever increasing dangers of city thoroughfares."

The record is barren of any evidence whatsoever which establishes or from which it might be inferred that attention of motorists and pedestrians is so diverted as to create new traffic hazards or that appellant's acts on the day of his arrest had that effect. There are many things on the public highways and streets which may similarly divert the attention of motorists and pedestrians, for example, billboards, window displays, road repairs, airplanes,

jet planes, etc. Even a pretty girl has been known to divert the attention of motorists. Yet no governing body or court would seriously contend that pretty girls should be barred from the streets and highways. Nor that such other lawful activities could or should be banned for that reason.

The Court has repeatedly asserted that uncontrolled official suppression of any of the guaranteed privileges cannot be made a substitute for the duty to maintain order in connection with the exercise of the right. *Hague v. C. I. O., supra; Lovell v. Griffin, supra; Schneider v. State of New Jersey; supra.*

In *Cantwell v. Connecticut*, 310 U. S. 206, the Court stated the principle in these words:

> "Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

Moreover, statutes that regulate speech or the press that have been upheld as not in conflict with our fundamental law, are those directed at abuses which menace the state itself, e. g., utterances or acts inimical to public welfare, tending to corrupt public morals, incite to crime, disturb the public peace, etc., and then only where there is a clear and present danger to a substantial interest of the State. *Thornhill v. Alabama*, 310 U. S. 88; *Cantwell v. Conn., supra; Thomas v. Collins*, 323 U. S. 516.

There is no such showing in the instant case of any sufficiently imminent menace to the State itself or to the public welfare from the use of sound apparatus in all cases as to warrant either the legislative body or this Court in determining that the use of such apparatus is not appropriate any place in the City of Trenton and for any purpose. Appellant's conduct was not said to involve a breach of the peace, commission of a nuisance, disturbance or impeding traffic. The utterances of appellant over the loud

speaker are not asserted to have been abusive, subversive or in any other respect unlawful.

I.

The Ordinance is presumptively unconstitutional because the State has failed to discharge the burden of proof imposed upon it in civil cases in prosecutions where the First Amendment is involved.

Both appellee and the New Jersey Supreme Court lean upon the doctrine of the protection of public rights and the presumption of constitutionality as a refuge from the constitutional assault here made by appellant. The Supreme Court actually concedes that the Ordinance may deprive appellant of his freedoms of expression and assembly, but seeks to justify it on the basis of the rights of the public to "at least a modicum of peace and quiet to which it is entitled." [12-15]

It is submitted that when a regulation enacted under the police power of a municipality, whether on its face, as applied, or constructively, abridges, prohibits, or infringes upon any of the freedoms guaranteed by the First Amendment to the Federal Constitution, such Ordinance or regulation is presumptively invalid and the burden falls on the authority asserting the power under the regulation to prove by a preponderance of the evidence that the regulation is a valid exercise of the police power directed at some abuse of the constitutional rights which, unless prohibited or regulated, would constitute a clear and present danger to the health, safety or general security of the community as a whole. The showing of the abuse is a condition precedent to the exercise of the police power where such exercise of power has a tendency to limit, infringe, restrict or prohibit any of the constitutional freedoms. The police power does not even exist in such cases unless there is a clear showing of the abuse. This rule is well stated by Chief Justice Hughes in *De Jonge v. Oregon* (1937), 299 U. S. 353:

"The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. * * * Therein lies the security of the republic the very foundation of constitutional government."

The same rule was effectively supplied by the United States Court of Appeals for the District of Columbia in *Busey v. District of Columbia*, 78 App. D. C. 189, 138 F. 2d 592. Mr. Justice Edgerton, speaking for the court said:

"Freedom of speech, press, and religion are entitled to a preferred constitutional position because they are 'of the very essence of a scheme of ordered liberty.' (*Palko v. Connecticut*, 302 U. S. 319, 325) They are essential not only to the persons or groups directly concerned but to the entire community. Our whole political and social system depends upon them. Any interference with them is not only an abuse but an obstacle to the correction of other abuses. (Civil liberties are at present relatively little threatened by governmental action, but in many communities the civil liberties of unpopular groups are greatly threatened by private terrorism. Legal recognition of these liberties tends to discourage this terrorism.): . . . [¶] We think we may hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed; at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. The burden of proof in such a case should be upon those who deny that these freedoms are invaded . . . [¶] . . . No presumption which lacks a probable basis in fact should be per-

mitted to conceal an interference with essential freedoms."

The City of Trenton thus-far has failed to show a real (as distinguished from imagined) clear and present danger and has thus not discharged the heavy burden that is placed on it where these precious civil rights are infringed.

No evidence was produced here and no showing made of the need for such an Ordinance. Until the City of Trenton, has discharged this burden, by proving a clear and present danger of substantial evils to the community, its attempts to apply and enforce the Ordinance cannot be sustained. In holding that a clear-and-present-danger test must be applied to police-power abridgments of the liberties protected by the First Amendment, the Court, in the "labor organizer" case, *Thomas v. Collins* (323 U. S. 516), said:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme of the great, the indispensable democratic freedoms secured by the First Amendment. (cases) That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153.
>
> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack

on due process grounds, will not suffice. These rights rest on a firmer foundation."

Judged by these standards, it is clear that appellant's conduct, under the circumstances, did not and could not constitute any clear and present danger which would justify an application of the police power that curtails the personal liberties secured by the Federal Constitution.

J.

Police power of the State authorizing the prohibition and censorship of commercial pursuits and activities do not enter here.

An Ordinance regulating commercial pursuits and activities is one thing, but the application of regulations to conduct such as of appellant in this case, thereby interfering with his exercise of a constitutional right, is another. There is a difference in degree, which emphasizes the importance of protecting the individual from invasion of his constitutional liberties as distinguished from regulation of purely commercial enterprises. See *Schneider v. State of New Jersey, supra,* where the Court made the differentiation as follows:

> "The Ordinance is not limited to those who canvass for private profit; nor is it merely the common type of Ordinance requiring some form of registration or license of hawkers, or peddlers. It is not a general Ordinance to prohibit trespassing. It bans unlicensed views or the advocacy of any cause from door to door * * *." See also *Valentine v. Chrestensen,* 316 U. S. 52, 55; *Jamison v. Texas,* 318 U. S. 413, 417.

K.

The Ordinance is void because, on its face and as construed and applied, it prohibits the exercise of freedoms of speech, press, assembly and to communicate information and opinions to others.

The Ordinance in question, in its broad sweep, prohibits speech entirely whether in a public or private place. It seeks to make no distinction as to the times, places, purposes or the contents of the utterances which it forbids. It lays down a blanket ban on all outdoor speaking, anywhere.

Section 4 of the Ordinance, under which appellant was charged, prohibits any person from using for any purpose whatsoever, a loud speaker or sound amplifier which emits therefrom "loud and raucous noises" and is attached to any vehicle operated or standing upon the streets of the City of Trenton.

The Ordinance here prohibits entirely the exercise of appellant's right of free speech. It can be seen from the decision of the Court in *Saia v. New York, supra*, that the Ordinance is absolutely prohibitory.

In that case the Ordinance of the City of Lockport prevented the use of sound amplifying devices except with the permission of the Chief of Police. In rejecting the Ordinance as unconstitutional the Court said:

> "We hold that § 3 of this ordinance is unconstitutional on its face, for it establishes a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted. The ordinance there-

fore has all the vices of the ones which we struck down in *Cantwell v. Connecticut*, 310 U. S. 296; *Lovell v. Griffin*, 303 U. S. 444; and *Hague v. C. I. O.*, 307 U. S. 496.

"In the Cantwell case a license had to be obtained in order to distribute religious literature. What was religious was left to the discretion of a public official. We held that judicial review to rectify abuses in the licensing system did not save the ordinance from condemnation on the grounds of previous restraint. *Lovell v. Griffin, supra,* held void on its face an ordinance requiring a license for the distribution of literature. That ordinance, like the present one, was dressed in the garb of the control of a 'nuisance.' But the Court made short shrift of the argument, saying that approval of the licensing system would institute censorship 'in its baldest form.' In *Hague v. C. I. O., supra,* we struck down a city ordinance which required a license from a local official for a public assembly on the streets or highways or in the public parks or public buildings. The official was empowered to refuse the permit if in his opinion the refusal would prevent 'riots, disturbances or disorderly assemblage.' We held that the ordinance was void on its face because it could be made 'the instrument of arbitrary suppression of free expression of views on national affairs.' 307 U. S. p. 516.

"The present ordinance has the same defects. The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine. Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the Cantwell case, freedom of the press in the Griffin case,

and freedom of speech and assembly in the Hague case."

Assuming that the city has the right to reasonably regulate the use of a sound amplifying device in circumstances like those here involved, as to time, place and manner, this Ordinance is not such. It appears on its face to be prohibitory. It does not attempt, either explicitly or implicitly, to license or in any other way regulate or control the use of sound apparatus on the City streets in the exercise of free speech and the communication of information and views. Section 4 of the Ordinance is so sweeping in its ban that it prevents any public outdoor meeting for any purpose whatsoever. It absolutely and unequivocally prevents the communication of views and the exercise of free speech, for it is practically impossible to exercise those rights on public streets today and be heard without the use of sound amplifiers.

This case falls squarely within the rule announced by the Court in *Hague v. C. I. O., supra;* in so far as the Ordinance provides for prohibition of the use of necessary and ancillary equipment in the exercise of freedom of speech the case falls within the rule announced by the court in *Jamison v. Texas*, 318 U. S. 413, and in *Saia v. New York, supra.*

The mere fact that the Ordinance is directed to the use of such sound apparatus on the streets or public places of the City of Trenton does not save it from the constitutional prohibition. It rather serves to condemn it. In the case of *Hague v. C. I. O., supra*, the Court declared unconstitutional an Ordinance of the City of Jersey City which sought to license, through the Director of Safety, public meetings in streets, parks and public places. The Court, in denouncing the Ordinance, held:

> "Wherever the title of streets and parks may rest they have immemorially been held in trust for the use of the public and, time out of mind, have been used

for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of the streets and public places have, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.

"The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not in the guise of regulation be abridged or denied."

In *Schneider v. State of New Jersey*, 308 U. S. 147, 60 S. Ct. 146, the Court declared unconstitutional an Ordinance of the Town of Irvington which prohibited canvassing, soliciting and the distribution of circulars, or other matter, or calling from house to house in that town, without first having reported to and received a permit from the Chief of Police or other police officer. It was argued there that the ordinance and regulations involved were designed for the purpose of preserving the peace, prohibiting fraud and trespass, and to keep the streets clean and of good appearance. In making its decision, the Court held the Ordinances not to be regulatory, but censorial and prohibitory and stated:

"This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. This phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights that lies at the foundation of free government by free men. It stresses as do many opinions of this Court, the importance of preventing the restriction or enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the Courts should

be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the Court to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights . . .

"As said in *Lovell v. City of Griffin, supra* (303 U. S. 444), pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantee.

"Conceding that fraudulent appeals may be made in the name of charity and religion, we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval. • • •

"'Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not

empower a municipality to abridge freedom of speech and press."

In a subsequent decision, *Cantwell v. Connecticut*, 310 U. S. 296; 84 L. Ed. (Adv. 836), a statute which prohibited solicitation without a permit of money or subscriptions for religious causes, was held to violate the freedom of speech guaranty as applied to one who stopped two men on the street, set up a phonograph and played a record attacking a certain religion and church. It was contended that the law was enacted to regulate solicitations for the prevention of fraud and imposition. The Court said:

> "First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment . . . In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom . . . . [¶] . . . Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

In *Thornhill v. Alabama* (310 U. S. 88), the prohibitory statute there knocked down prevented picketing and going upon private premises. The petitioner picketed upon the private premises of the Brown Wood Preserving Company, Inc., contrary to its wishes, and in defiance of its commands to leave the property. In setting aside the conviction as being an abridgment of freedom of speech and press, the Court said:

> "First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured

to all persons by the Fourteenth Amendment against abridgment by a state . . .

"Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations. *Schneider v. State*, 308 U. S. 147, 161, 162."

L.

The Ordinance is void because its provisions are so obscure, vague and indefinite as to make them impossible of reasonable interpretation, and, therefore, are in violation of the 14th Amendment to the Federal Constitution.

The criminal statute vague and indefinitely expressed so that it fails to establish a standard of conduct comprehensible to men of common intelligence, to the end that they may act to keep themselves without the purview of the statute, deprives defendants in criminal cases of their liberty without due process of law.

In *United States v. Cohen Grocery Co.*, 255 U. S. 81, Chief Justice White said:

"Therefore because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained. . . .

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question: that is, whether the words, 'That it is hereby made unlawful for any reason wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statements as to render elaboration on the subject wholly unnecessary."

The Court in the case of *Lanzetta v. The State of New Jersey*, 306 U. S. 451, held Section 4, Chapter 155, Laws of 1934, commonly known as the Gangster Act, unconstitutional on the ground that the act was vague and uncertain, the Court stating:

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rules is stated in *Connally v. General Constr. Co.*, 269 U. S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'"

In dealing with the question of the vagueness of this Ordinance, let us first for a moment consider the phrase "unnecessary noise." What does the Board of Commis-

sioners mean by "unnecessary noise?" What is "necessary noise" and what is "unnecessary noise?" Webster's New International Dictionary, 2d Edition, says that "unnecessary" is something not needed or required and that "necessary" is essential to a desirable or projected end or condition or resulting from the happening in accordance with necessity; determined by the nature of things; predestined or obedient to natural law.

Who, in the case sub judice, is to determine what is "necessary" and what is "unnecessary" noise? By what basis or standard is this to be determined? Additionally, the terms "physically annoying," "harsh," "prolonged," "unnatural," "unusual," "physical discomfort," "loud," "annoyance," "inconvenient," "raucous," "unreasonable," are abstract and indefinite. When do they arise? Is it left to the complainant, the Police Officer or the trier of the law and the facts to determine beyond a reasonable doubt, when noises or sounds are "necessary" or "unnecessary," "physically annoying to persons," "harsh," "prolonged," "unnatural," or "unusual in their time and place" and when they occasion "physical discomfort?"

What may be deemed necessary by one person can at the same time be unnecessary to another. What may be physically annoying, harsh, prolonged, unnatural or unusual to one person may be comfortable, natural and usual to another. What may occasion physical discomfort to one may give another comfort and pleasure. How is a person to know what sounds may be deemed necessary, comfortable and pleasing to others and what will occasion hostile feelings in them?

Examining Section 4 of the Ordinance, we find forbidden "loud" and "raucous" noises which emanate from a sound apparatus. What is meant by "loud" and what is meant by "raucous?" Webster's New International Dictionary, 2d Edition, defines "loud" as being marked by intensity or relative intensity; not low and soft or subdued. The word "raucous" it defines as disagreeably harsh.

These terms, as previously stated, are abstractions. They depend entirely upon the subjective reactions and responses of individual persons in each given case. Thus phases of human reaction or emotion are made the standard for a penal statute. This is forbidden under our law.

It has been established that a criminal statute, to be valid, must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated act is within or without the law. On the other hand, it must not be so broad and elastic in its terms as to compel a man to guess at his peril whether a judge or jury may think his act is in violation of it, and, if deviation from a standard is prohibited the standard must be definitely fixed.

In *United States v. Brewer*, 139 U. S. 278, the Court said:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. *United States v. Sharp*, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. *United States v. Lacher*, 134 U. S. 624, 628."

The entire Ordinance is replete with words and phrases which lack certainty. In the first section we find such phrases as "unnecessary noises," "physically annoying to persons" or so "prolonged, unnatural, or unusual in their use, time and place" as to occasion "physical discomfort." Those phrases are uncertain and indefinite so that serious doubts arise from the generality of just such language.

The second section of the enactment also employs the expression "with louder volume than is necessary for convenient hearing." It is ambiguous. The Ordinance fails to indicate what constitutes "convenient hearing."

The third section of the Ordinance employs the terms "annoyance," "inconvenience." These too are ambiguous

and indefinite, for it does not indicate what would constitute "annoyance" or "inconvenience."

The fourth section uses the term "loud and raucous noises." This as previously stated is uncertain and indefinite and dependent upon subjective reaction and response of individual persons.

And so the same can be said of the phraseology in the sixth section, an "unreasonable loud or harsh sound" and "unnecessary" or "unreasonable" period of time.

The challenged provisions condemn no act or omission. The terms which the Ordinance employs and which it purports to denounce are so vague, indefinite and uncertain that the entire Ordinance as well as Section 4 of the Ordinance must be condemned as repugnant to the due process clause of the 14th Amendment and the like provisions in the State Constitution.

M.

The Ordinance is void because its provisions do not fix or establish any proper standard for the determination of what is and what is not necessary and unnecessary noises and sounds, and what is loud, raucous noises, and what is unnecessary or unreasonable periods of time, what is physically annoying to persons, what is harsh, prolonged or unnatural or unusual, what amounts to annoyance or inconvenience of persons, but delegates the matters to be arbitrarily decided by individuals without prescribing any rules, bases or limitations to act as a guide in forming a judgment, contrary to the 14th Amendment to the Federal Constitution guaranteeing due process of law.

If the legislature, or any law-making body, leaves to administrative officers the determination of what the law should be, or to determine what acts are necessary to effectuate the law, such delegation of authority is void. *U. S. v. Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516.

The Ordinance sub judice clothes administrative officers with arbitrary and discriminatory power to determine

what is meant by and what constitutes "necessary" and "unnecessary" sounds, "unnecessary or unreasonable periods of time," "physically annoying to persons," "harsh," "prolonged or unnatural or unusual," "annoyance or inconvenience," and specifically in Section 4 of the Ordinance, what is meant by and what constitutes "loud and raucous noises." The Ordinance fails to specify when specific acts are brought within its prohibition under those phrases. Moreover, it fails to prescribe any rules, bases or limitations to act as a guide in forming judgments by the administering officers. The criminality is dependent upon what variant courts may determine to be loud and raucous noises. It must of necessity vary with the different reaction of every individual complainant and of every court. So construed the Ordinance and Section 4 thereof must of necessity fall within the constitutional prohibitions.

N.

The decisions sustaining anti-noise ordinance, as applied to sound devices used in connection with public speech at assemblies and upon public streets, are not sound.

The New Jersey Supreme Court relied upon the cases of *Cox v. New Hampshire*, 312 U. S. 569, 61 S. Ct. 762 (S. C., p. 18); *Brachey v. Maupin*, 277 Ky. 467, 126 S. W. (2d) 881; *Maupin v. Louisville, et al.*, 284 Ky. 195, 144 S. W. (2d) 237; and *Hamilton v. Montrose*, 109 Colo. 228, 124 P. (2d) 757 (S. C., p. 21). Not any one of the cases is really analogous in fact or law to the case at bar.

In both Kentucky cases cited, *Brachey v. Maupin, supra*, and *Maupin v. Louisville, supra*, the ordinances involved did not entirely prohibit the use of sound trucks, but rather attempted to regulate their use. In the former case, the attempted regulation was through designating certain areas comprising 5% of the city through which sound trucks could not be operated, letting free the remaining 95% and fixing certain hours for such operation. In the latter

case, the regulation was through a license of sound trucks by the Chief of Police. We do not pass judgment on whether such regulations were reasonable and proper, but merely point to the fact that those ordinances were not entirely prohibitory as is the one here questioned.

As a matter of fact, the Court of Appeals of Kentucky, in *Brachey v. Malpin, supra*, pointed out that the Kentucky Courts had previously stricken out two ordinances, one passed in 1931 and the other in 1935, which were entirely prohibitory and not regulatory and stated (126 S. W. (2d) at p. 882):

> "We are unable to agree that the former ordinances and the one presently involved are of the same character and kind. It is our view that they are radically different. The former two ordinances sought to entirely prohibit the operation of a sound truck in the City of Louisville at any time or place, whereas the amendatory ordinance here involved is not so broad in its scope and seeks to regulate rather than prohibit."

The Supreme Court of Colorado in *Hamilton v. City of Montrose, supra*, rested its decision mainly on the facts produced by testimony of witnesses, which were found to show that the conduct of the defendant amounted to a breach of the peace and disturbed lawful occupants and property owners in the neighborhood. The Colorado Court specifically stated (124 P. (2d) at p. 761):

> "Applying, therefore, the same standards that were used in the Cantwell Case (*Cantwell v. Connecticut, supra*), we reach an opposite conclusion in the instant case from that announced in the Cantwell case because of the differing facts."

There was no evidence of that type produced in the case sub judice, no similar factual situation and no finding of facts upon which either the lower court or the Supreme Court could base its decision.

The decision of the Court below and that of the Colorado Supreme Court in *Hamilton v. City of Montrose, supra,* are ably analyzed in the clear and cogent dissent of Mr. Justice Otto Bock in the *Hamilton* case. The dissenting opinion differed with both the findings of fact and the conclusions of law and declared (109 Colo. at p. 239):

> "The constitutional questions raised are of more importance. Within the last decade the Supreme Court of the United States, under the able leadership of the then Chief Justice Charles Evans Hughes, showed in an affirmative way how the civil liberties of the individual may be vindicated and preserved. Practically all of the cases cited in the majority opinion indicate this definite trend. What freedom of speech, the press, and exercise of religion actually mean can be determined only when these principles are tested in specific instances. The tendency now is not to widen the conflict between liberty and authority, but to reconcile the competitive relationship between these governmental principles. Would a statute or ordinance which absolutely prohibits the use of any loud-speaking device under any circumstances be an abridgment of free speech? I say it certainly would. Just as the right of free press includes the right to 'distribute', so freedom of speech includes the right to be 'heard.' The use of a loud-speaker, under the circumstances, is not a nuisance per se. . . . . A loud-speaking device is a great convenience to those who desire to hear and be heard, and bears a necessary relationship to freedom of speech. Its use may reasonably be regulated as to time, place and manner. Cantwell v. Conn., 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352. . . . Concepts of civil liberty, such as freedom of speech and the press, are relative and not absolute, and vary with time and circumstances; and so, amplification devices, in recent years, have gone largely into

use, and have their necessary place in the exercise of these constitutional rights. That a city may regulate the use of such sounding devices and protect itself 'from concentrated and continuous cacophony' already has been indicated above. The inertia which sometimes exists in municipalities in protecting individual liberty must be overcome by affirmative action in the enactment of laws that will not abridge, but reconcile, the exercise of free speech and religion, with the authority to reasonably regulate it in the interest of the public safety, health, welfare or convenience. . . .

"The majority of the court here relies on the case of *Cox v. New Hampshire*, 312 U. S. 569, 61 S. Ct. 762, 764, 85 L. Ed. 1049, 133 A. L. R. 1396, to justify its opinion. In that case the sole charge against appellants was that they were 'taking part in a parade or procession' on public streets without a permit as the statute required. In referring to that case in *Trojello v. Walenburg*, 108 Colo. 427, 118 P. 2d 1081, we said that it contained an excellent statement of the power of a municipality to impose regulations in the use of public streets." *Hamilton v. Montrose*, 109 Colo. 228, 239-240, 242.

As was shown by Mr. Justice Bock, *Cox v. New Hampshire*, 312 U. S. 569, is not in point and does not support the conclusions reached by either the Colorado or our own Supreme Court.

The ordinances involved in the *Hamilton* case and in this case have been erroneously compared with and simulated to the New Hampshire statute involved in the *Cox* case. It should be remembered that the New Hampshire Supreme Court found that the statute in the *Cox* case, as construed by the court, was a regulatory measure as to time and place. It was a revenue-raising measure to provide for policing of parades and placing a portion of the burden of expense of managing the city's traffic during a parade upon

the holders of the parade. The statute in the *Cox* case did not attempt to prohibit or censor. The ordinance in this case prohibits.

The section of the Ordinance in question is not limited to speech which is obscene, offensive to public morals or advocates unlawful conduct. Nor does it make comfort or convenience in the use of streets the standard of official action. It is comprehensive in its ban of the use of sound apparatus and forbids it for any and every purpose. There is no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants or the misuse or obstruction of the streets. It prohibits entirely the use of a device which is a great convenience to those who desire to hear and be heard and has a necessary relationship to the exercise of freedom of speech and assembly.

Although the rights previously enumerated are not absolute, and the State in the exercise of its police power may punish the abuse of these freedoms, it cannot under the guise of regulation abridge or infringe upon them.

CONCLUSION.

The principles here involved are identical to the ones determined by the Court in *Saia v. New York*, 334 U. S. 558. The present Ordinance has the same defects as the Ordinance of the City of Lockport. The terms of the Ordinance providing for prohibition of the use of sound devices are in effect identical to the prohibitory provisions of the Ordinance invalidated by this Court in *Saia v. New York, supra*, and in other former cases. As was pointed out by the Court in the *Saia* case, *supra*, the use of a sound device ancillary to the exercise of free speech is not per se an abuse of free speech but rather is an "indispensable instrument of effective public speech" and cannot be indis-

criminately and arbitrarily suppressed. The police power can control the abuse by narrowly drawn statutes.

The Court in the *Saia* case, *supra*, pointed out further that freedom of speech with the use of loud-speakers must be given the same preferred treatment that was given to freedom of religion, freedom of press and freedom of assembly in prior cases and that in balancing the various community interests the freedom of the First Amendment must be maintained in a preferred position.

The present Ordinance on its face, and as construed and applied by the Courts below, does not purport to be a regulatory law. It is prohibitory. No attempt is made by the Ordinance or the authorities enforcing it to regulate the volume of sound, or the hours or places of use of sound amplifying devices. The face of the Ordinance and the record as to its application and enforcement shows unquestionably that it is a prohibitory Ordinance. It lays down an absolute ban on the use of an adjunct of free speech which is necessary in order to make it effective. The constitution prohibits such an abridgment. Its restraints make no attempt at regulation.

Since the Court has already determined that the denial of the use of a sound device is an abridgment and curtailment of freedom of speech, the ban imposed here on the use of sound amplifiers falls within the constitutional prohibition.

There being an abridgment of the right of free speech on the public streets of the City of Trenton by the arrest, prosecution and conviction of the appellant because of his use of a sound device, it is necessary to set the conviction aside.

The criminal code must be definite and informative so there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit. The terms used in the present Ordinance are abstractions and are relative in the individual. There is no norm to judge whether or when

the forbidden reactions to the use of a sound amplifying device comes into being. It may be entirely subjective in a given case. Such phases of human reaction or emotion cannot be made a legitimate standard for a penal statute.

The criminality of an act cannot depend on whether a judge or a jury may think it reasonable or unreasonable. There must be some definiteness and certainty. It must prescribe rules, bases or limitations to act as a guide in forming judgments by administering officers.

There being no such definiteness and certainty in the provisions of the present Ordinance and no proper standard for the determination of what constitutes a violation of such provisions, the Ordinance constitutes an abridgment of the guarantees set forth in the 14th Amendment of the United States Constitution and the arrest, prosecution and conviction of appellant under this Ordinance must be set aside.

WHEREFORE, it is respectfully submitted that the judgment of the Courts below should be reversed, the conviction set aside and the prosecution ordered dismissed.

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